

The notion of adverse human rights and environmental impacts within the Draft CSDD Directive: alignment of the draft Directive with the UNGPs

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On the 23rd of February 2022, the long-awaited Corporate Sustainability Due Diligence Directive was released by the European Commission. This proposal followed growing pressure for mandatory due diligence legislation by various stakeholders, including large businesses, associations, and investors (1), and a call for action of the European Parliament and the Council (2).

The proposed Directive was preceded by a Study commissioned by the EC that demonstrated that voluntary due diligence is not significantly exercised by companies in Europe, highlighting the need for legislation that requires implementing comprehensive mandatory human rights and environmental due diligence in global value chains. According to the Explanatory Memorandum of the proposed Directive, the failure to undertake due diligence has led to "negative externalities from EU production and consumption [being] observed both inside and outside the Union". As such, Member States will now be required to place new due diligence obligations on in-scope companies, as defined by the OECD Due Diligence Guidance for Responsible Business Conduct, and companies will need to carry out due diligence on "actual and potential human rights adverse impacts and environmental adverse impacts" (3) with respect to their global value chains. To better understand the material scope of the proposed Directive, it is important to clarify what adverse human rights and environmental impacts companies are expected to focus on.

Under the proposed Directive, an 'adverse human rights impact' is defined, in article 3, point c), as an "adverse impact on protected persons *resulting from the violation* of one of the rights or prohibitions listed in the Annex, Part I Section 1, as enshrined in the international conventions listed in the Annex, Part I Section 2". Similarly, an 'adverse environmental impact' is defined, in point b), as an "adverse impact on the environment *resulting from the violation* of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II". However, none of the definitions elucidates what would be needed for the 'violation' of one of these rights or prohibitions to take place.

According to the OHCHR, it is unclear if the word 'violation' was purposefully chosen to suggest that an adverse impact must result from a breach by a State – as the primary duty-bearer under the conventions listed in the Annex – which would deviate the focus of due diligence from business to State activities (4). Additionally, requiring the existence of a violation makes the definition of 'adverse human rights impact' provided by the proposed Directive much narrower than the one provided by the United Nations Guiding Principles on Business and Human Rights (UNGPs) that frames adverse impacts as the removal or reduction of the ability to enjoy internationally recognised human rights (5). This can lead to the exclusion of various relevant business-related human rights abuses from the scope of due diligence obligations under the proposed Directive (6). The same comparison cannot be established regarding 'adverse environmental impacts', since the UNGPs do not provide a definition for that term.

Following these considerations about the introduction of the word 'violation', the list of rights and prohibitions relevant to the definition of 'adverse human rights impacts' and the list of international environmental conventions relevant to the definition of 'adverse environmental impacts' will be analysed.

Section 1 of Part I of the Annex contains a list of twenty human rights and prohibitions enshrined in international human rights instruments that are commonly affected by business activities. At first sight this seems to suggest that due diligence is restricted to a limited list of human rights impacts. Nonetheless, that list cannot be considered exhaustive.

Firstly, because it would risk getting outdated very quickly. Secondly, because looking at rights in an isolated matter, as if they were the only rights that could be affected by business activities, disregards the principles of indivisibility and interdependence of human rights recognised in the Vienna Declaration. Thirdly, because the list is incomplete. All the 'internationally recognised human rights' – which are considered to be, at the minimum, the rights recognised "in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work" or, depending on the context, other additional standards (7) – are within scope of due diligence obligations under the UNGPs. However, the list in Section 1 of Part I of the Annex fails to reference key rights in the International Bill of Rights as, for instance, the right to social security, freedom of expression or the right to a fair trial, as well as several additional standards businesses are expected to consider, for instance, when operating in conflict-affected regions, such as International Humanitarian Law (8). This demonstrates that the approach followed by the European Commission is not consistent with the spirit of the UNGPs.

Notwithstanding, in accordance with the OHCHR, the European Commission appears to have thought about making the coverage "comprehensive" (9) when deciding to include a 'catch-all' clause encompassing any "violation of a prohibition or right *not covered by points 1 to 20 above* but included in the human rights agreements listed in Section 2 of this Part, which directly impairs a legal interest protected in those agreements (...)" (10). This clause is more in line with the definition of human rights due diligence provided in the Guiding Principle 17 of the UNGPs (11). However, it seems rather odd that such an extensive list of specific rights and prohibitions is combined with a 'catch-all' clause referring to a list of human rights instruments. This approach does not contribute to legal clarity regarding the adverse human rights impacts companies need to take into account and, as the European Coalition for Corporate Justice points out, creates the risk of "promoting a selective application of standards" by companies (12).

Furthermore, the list of human rights agreements to which this clause refers to is also not complete. Several key human rights instruments are missing, including the ILO Convention 190 on Violence and Harassment in the World of Work, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the ILO Convention 169 on Indigenous and Tribal Peoples, the UN Declaration on Human Rights Defenders, ILO Instruments on Occupational Safety and Health, the first two optional protocols to the Convention on the Rights of the Child (on the Involvement of Children in

Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography), the European Convention on Human Rights and the EU Charter of Fundamental Rights.

Regarding Part II of the Annex, that concerns adverse environmental impacts, it is even more notorious that the list of violations of environmental norms is inadequate to provide for sufficient coverage of environmental impacts that should be addressed in a due diligence exercise. According to the European Coalition for Corporate Justice, this happens because the body of internationally recognised environmental standards *per se* is not comprehensive enough to cover all environmental impacts that can take place across global operations, value chains and investments (13). As such, one simpler option would be to establish a duty of care for companies regarding environmental damage in general, rather than trying to define all the adverse environmental impacts that should be addressed through due diligence (14).

However, if the chosen approach is the latter, key environmental conventions such as the Paris Agreement, the International Convention for the Prevention of Pollution from Ships, the UN Convention on the Law of the Sea, the UN Convention to Combat Desertification or the Aarhus Convention cannot be missed, as well as the reference to important principles of international and EU environmental law companies should respect, “such as the prevention, precautionary, rectification-at-source and polluter-pays principles” (15). In addition, environmental impacts should be defined not only by reference to EU environmental laws and few existing international conventions, but also by a broad illustrative list of all sorts of possible adverse environmental impacts, which, as suggested by the European Coalition for Corporate Justice, could include direct and indirect effects on air, soil, water and noise pollution, production of waste, deforestation, loss of biodiversity, among others (16), regardless of constituting an evident or immediate violation of human rights. For adverse climate change impacts to fall in the scope of due diligence obligations, they should also be expressly mentioned in this list.

Even though human rights violations and environmental and climate abuses are often linked, the environment has intrinsic value and deserves effective protection by itself (17). Including a provision that only covers environmental degradation that negatively impacts human rights on Paragraph 18 of Section 1 of Part I of the Annex may lead to companies neglecting environmental impacts that are not clearly linked to human rights (18) and facing challenges in carrying out *ex post facto* assessments to ascertain if a link between adverse human rights impacts and ordinary activities such as pollution can be established (19).

The CSDDD has the potential of representing a landmark step forward in advancing protection of human rights and the environment from harmful business activities, by guaranteeing corporate accountability and adequate redress to the victims of corporate abuses, while creating legal certainty and, to a certain extent, levelling the playing field for businesses operating in the internal market. However, despite being understandable why the European Commission has sought to restrict the material scope of the Directive and outline obligations in a clear manner to alleviate the practical difficulties of exercising value chain due diligence, the intent of the UNGPs regarding the subject should be respected.

Therefore, it is recommended that the requirement of a ‘violation’ of the rights or prohibitions listed in the Annex to have occurred for an adverse human rights and environmental impact to be identified is deleted. Moreover, in case the definitions of adverse human rights and environmental impacts continue to refer to a catalogue of individual rights and prohibitions rather than exclusively referring to a list of international and European instruments, it is advised that missing human rights and environmental standards and instruments are explicitly introduced and the lists are merely illustrative instead of prescriptive. This way, the negative impacts that business activities can cause could be significantly covered. It remains to be seen how the discussion between the co-legislators regarding this topic evolves in the coming months.

References

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- (2) See European Parliament Resolution of 10 March 2021 with recommendations to the Commission on Corporate Due Diligence and Corporate Accountability (2020/2129(INL)) and Council Conclusions on Human Rights and Decent Work in Global Supply Chains of 1 December 2020 (13512/20).
- (3) Article 1 of the proposed Directive.
- (4) Office of the High Commissioner for Human Rights (OHCHR). (2022). *OHCHR Feedback on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence*. <https://www.ohchr.org/sites/default/files/2022-05/eu-csddd-feedback-ohchr.pdf>.
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- (7) Guiding Principle 12 of the UNGPs.
- (8) Office of the High Commissioner for Human Rights (OHCHR). (2022). *OHCHR Feedback on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence*. <https://www.ohchr.org/sites/default/files/2022-05/eu-csddd-feedback-ohchr.pdf>.
- (9) See Recital (25) of the proposed Directive.
- (10) Paragraph 18 of the Annex to the proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937. https://commission.europa.eu/system/files/2022-02/1_2_183888_annex_dir_susta_en.pdf.
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- (12) European Coalition for Corporate Justice (ECCJ). (2022). *European Commission's proposal for a directive on Corporate Sustainability Due Diligence: A comprehensive analysis*. <https://corporatejustice.org/wp-content/uploads/2022/04/ECCJ-analysis-CSDDD-proposal-2022.pdf>.
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- (14) Friends of the Earth Europe (FEE). (2021). *How to make corporations effectively respect the environment and climate*. <https://friendsoftheearth.eu/wp->

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